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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 288.

IN THE MATTER OF THE DETERMINATION OF GOOD MORAL CHARACTER OF MICHAEL ZIPKIN.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri.

BRIEF OF RESPONDENT.

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BRIEF OF RESPONDENT.

OPINIONS BELOW

The order of the court below (R. 118) is unreported. The findings and order of the State Board of Law Examiners (R. 95-104) are unreported.

JURISDICTION

The order of the Supreme Court of Missouri was entered on April 10, 1961. A motion for rehearing was denied on May 8, 1961. The petition for a writ of certiorari was granted on October 9, 1961. The jurisdiction of the Court is invoked under 28 U. S. C. 1257.

QUESTION PRESENTED

Whether the evidence in the record, together with the aid of all reasonable inferences flowing therefrom, rationally supports the finding of the Missouri Board of Law Examiners that petitioner did not satisfy his burden of proving good moral character.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment of the United States Constitution provides in pertinent part as follows: "No State shall . . . deprive any person of life, liberty or property without due process of law."

STATEMENT

Background to Hearing by Board of Law Examiners

Petitioner, a resident of Kansas City, Missouri, graduated from the University of Missouri School of Law in June, 1960, at the age of twenty-five (25). He took the Missouri State Bar Examination the same month, but did not pass. While the Board of Law Examiners was still in the process of grading examination papers, a member of the Board received a complaint from a member of the Missouri Bar that petitioner had held himself out as an attorney[1] and had attempted to influence the testimony of a witness at a hearing pertaining to charges of unprofessional conduct by a Missouri psychiatrist, one Dr. Freeman. This was the first complaint the Board had received about petitioner and he had previously been found to be of good moral character by the Missouri Bar Committees for the Sixteenth and Thirty-fourth[2] Circuits (R. 68, 93, 101).

Upon receipt of the complaint, an investigation of the charges against petitioner was made at the request of the Board of Law Examiners. In the meantime, the Board decided to complete the grading of the petitioner's examination paper, along with the papers of all other applicants for admission to practice law in Missouri (R. 93, 94). Petitioner failed the bar examination and was so advised on September 13, 1960 (R. 94, 105). At the same time, petitioner was notified that the Board of Law Examiners

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[1] The Board subsequently found in favor of petitioner on the charge that he held himself out as an attorney (R. 98-99).

[2] The record shows that the Thirty-Fourth Circuit Bar Committee made the finding although, as petitioner suggests (Brief of Petitioner at page 3, note 1), it was probably the Thirteenth Circuit Bar Committee in Columbia, Missouri (Boone County).

had received a report from Fred Hulse, General Chairman of the Missouri Bar Administration, which raised a question as to whether petitioner met the character requirements for application for admission to the Bar (R. 94, 105). Petitioner was further advised that if he desired to take a second bar examination, it would be necessary for the Board to investigate further the matter of petitioner's character and hold a hearing thereon. Petitioner advised the Board that he did intend to take a second bar examination in February, 1961. On October 4, 1960, petitioner was advised that a hearing on the question of whether he met the requirement of good character would be held on October 21, 1960, and that the hearing would be particularly directed to the questions of whether petitioner attempted to influence the testimony of a witness in connection with the Dr. Freeman hearing and whether petitioner had held himself out as a member of the Bar.[3] Petitioner was further advised that the Board had subpoena power and that if he desired to subpoena witnesses, the Board would send him subpoenas. He was also advised that he was entitled to be represented by counsel (R. 95, 108, 109). On October 8, 1960, petitioner wrote the Board and advised that he would be represented by an attorney at the hearing and requested the names of witnesses the Board intended to subpoena with regard to the matters being investigated. On October 12, 1960, the Board advised petitioner of the names of the witnesses to be subpoenaed and of the exact time and place of the hearing (R. 95, 96, 110, 111).

The hearing before the Board was held on October 21, 1960, as scheduled, and petitioner was present in person and represented by an attorney (R. 1, 2, 3, 96). The announced purpose of the meeting was to determine whether

[3] The Board found in favor of petitioner on this charge (R. 98-99).

or not petitioner met the qualifications of good moral character so as to be entitled to take the Missouri bar examination (R. 1).

Testimony at the Hearing

Carl Sapp testified that he had been a practicing attorney in Columbia, Missouri, for approximately twelve (12) years and that he represented Dr. Freeman in the hearing before the State Board of Healing Arts (R. 3). He stated that he had known petitioner for six or seven months and that he had talked to petitioner on two, three or four occasions during that time (R. 4, 5). He further stated that he was not acquainted with petitioner's reputation and that he did not know anything about petitioner's general fitness to be a member of the Bar (R. 5). He stated that he would be willing to sign an affidavit for petitioner stating that from his experience petitioner had conducted himself as a gentleman (R. 5). He further stated that there was considerable community feeling about the Dr. Freeman hearing, but that while the community feeling at first was against Dr. Freeman, the feeling at the time of petitioner's hearing seemed to be backfiring and going the other way (R. 7).

Loren D. Bauriehter testified that he was a resident of Columbia, Missouri, and had known petitioner approximately a year (R. 8). He testified that he had always been on a friendly basis with petitioner and that they were social acquaintances (R. 8). He further testified that petitioner had "acted as a gentleman" and that he "had no reason to see otherwise" than that petitioner was a person of good reputation (R. 13, 18).

Professor Edmond R. Anderson, Jr. testified that he was a professor at the Missouri Law School and that he had known petitioner since the Spring semester of 1958 (R. 21). He testified that he believed that petitioner met the

requirements for admission to the Missouri Bar (R. 26) and that he was "reasonably willing to vouch for Mr. Zipkin's character" (R. 27). He stated, however, that he did "have some, very faint, reservations about Mr. Zipkin, or anyone else, in the present group, who are being admitted to the Bar" (R. 27). He stated that the specific reservation he had in mind with regard to petitioner was that petitioner had told him that while he was working as a Democratic election judge, and people came in and said they wished to vote for Mr. Symington, "it was Mr. Zipkin's disposition, from his own statement to me, to follow what had been told him by others to help them vote the straight Democratic ticket" (R. 27). Professor Anderson stated "that this was a minor thing to worry about, and I don't worry about it" and that he had no other specific reservation about petitioner (R. 27). He also testified that he believed that petitioner was generally fit to be a member of the Bar (R. 28) and that persons he knew in Columbia and Kansas City thought well of petitioner (R. 29).

Dean Joseph Covington testified that he was Dean of the Missouri University Law School and that he had known petitioner since late in 1958 or early in 1959. He stated that he had no personal knowledge of any matter which would prohibit petitioner from practicing as a lawyer but that he was not acquainted with petitioner's reputation (R. 32, 33). He stated that his only acquaintanceship with petitioner was in his official capacity (R. 33) and that once he had a personal conversation with petitioner when he was missing a good many classes and he put him on probation (R. 34). Other than that, he had spoken to him casually in the hallway and one other time when he told the Dean he was going to miss class because his wife had had a baby (R. 34). He further testified that he had received a report from one of the faculty members that petitioner had "intimidated some

witnesses," but that since petitioner had already graduated from the law school, and since the Dean knew that the matter was being investigated by the Missouri Bar, he took no action (R. 37, 38, 39).

Mrs. Ada Margaret Baurichter testified that she was the wife of Loren D. Baurichter and that she had known petitioner for approximately a year and a half (R. 41, 44). She stated that in her opinion his reputation was good and that he was highly spoken of (R. 44).

Michael J. Trombley was the main witness who testified against petitioner. He testified that he was twenty-six (26) years old and practiced law in Columbia, Missouri. He stated that he was graduated from Missouri University Law School in February, 1960, and that he first met petitioner in the Fall of 1957 in their Freshman year together. Trombley and petitioner were social acquaintances and at one time were close friends (R. 55). Trombley testified that he employed a woman by the name of Irene Weirhake as a housekeeper and that Mrs. Weirhake lived in a basement apartment in his home. She had been a patient of Dr. Freeman (R. 55, 56).

Trombley further testified that while Mrs. Weirhake was under treatment by Dr. Freeman, she was informed that she was to appear as a witness against the Doctor at his hearing; that she asked Trombley's advice as to what she should do and that Trombley advised her to tell the truth; that she went to Dr. Freeman and told him that she was going to be called and that she was going to tell the truth; and that Dr. Freeman had advised her that this would not be wise, that something would happen to her whereby she would probably be "kicked out of the Trombley house", that her reputation in the community would be ruined, and that a lot of derogatory things would happen to her (R. 60). Mrs. Weirhake told Trombley and

his wife what the Doctor had said, and shortly thereafter, within a matter of a couple of days, Trombley and his wife received a phone call from petitioner (R. 56, 60).

Trombley further testified that during the phone call, his wife was on one phone in their house, and Trombley was on another and that he recognized the voice on the other end as that of petitioner (R. 56). His version of the telephone conversation was as follows:

> "Sir, Mr. Zipkin was talking to my wife and I picked up the receiver. He mentioned the fact that he was helping Dr. Freeman with his case and that things were looking well, that there had been some new material, or something new had come up but there was a problem in that Irene, I mean Mrs. Weirhake, was in a truth telling mood and that he felt my wife and I should meet with he (sic) and Dr. Freeman to see what could be done about Mrs. Weirhake" (R. 57 and see R. 61).

Trombley further testified that he asked petitioner whether he was trying to intimidate a witness and what "was going on," and petitioner stated: "I think it would be better for everybody all the way around if we met and decided what to do with Mrs. Weirhake" (R. 57). Trombley testified that shortly thereafter he hung up his telephone and that he had no further conversation with petitioner except that once they said hello to each other as petitioner was crossing the street (R. 57).

Trombley further testified that he and his wife at one time were patients of Dr. Freeman (R. 62); that he and Zipkin stopped associating with each other because of the Dr. Freeman hearing (R. 57, 58); that he had no animosity toward petitioner (R. 58); that he did not voluntarily supply the information about the telephone call to the Board of Law Examiners, but that he was specifically asked by a Mr. Alexander, attorney for the Medical Board,

whether "anything was done in relation to" the witnesses Trombley was representing during the hearing, one of which was Mrs. Weirhake; and that it was in response to this inquiry that he told Mr. Alexander of the telephone conversation (R. 63-64). After he told Mr. Alexander about the call, he was contacted by lawyers representing the Missouri Bar Committee, and he also told them about the telephone conversation (R. 64).

Trombley also testified that in his personal opinion, petitioner's reputation was not particularly good and that his opinion was based on his personal experience within the previous few months (R. 62, 63). He testified that he was a character witness for petitioner in his divorce case in 1959, but that his opinion of petitioner had changed since that time (R. 63).

Petitioner took the stand in his own behalf and testified that he was twenty-five (25) years old and graduated from Missouri University Law School in June of 1960. He stated that he was introduced to Dr. Freeman by Mr. and Mrs. Trombley around December of 1958 and that shortly thereafter petitioner became a patient of Dr. Freeman (R. 68).

Petitioner testified that the reason he called the Trombleys was that he thought they should know that Mrs. Weirhake was going to testify since he knew that Mr. and Mrs. Trombley were afraid of their reputation and did not want to get involved with any gossip about Dr. Freeman. His testimony on this point was as follows:

> "Q. Now, referring back to the phone conversation you (fol. 115) had with the Trombleys. I believe you said something to the effect that this Irene woman is going to testify against Dr. Freeman and you folks may be dragged in to it. Now, what was the purpose of your call? What possible good could you have done

in telling them that when they, of course, were as well aware of it as you?

A. Well, in the first place I did not know that they knew about it. I thought it was something on a fresh rumor. Secondly, prior to this time, when Mr. and Mrs. Trombley had ceased their relationship professionally with Dr. Freeman they made the statement to me, 'You know, Mike, Mike Trombley is going to be a lawyer and we want to set ourselves up in this town and become members of the community and we just can't take a, well, we just can't stand, we won't be able to stand the gossip that is going on about him.'

Q. When was that said?

A. This was said in a casual conversation in their home sometime prior—after the split with Freeman but prior to his hearing, I believe. My impression of the Trombleys' split with Dr. Freeman on Mrs. Trombley's part is that she was afraid, she was frightened that being a patient of Dr. Freeman and hearing all the gossip it would reflect on her and her husband.

Q. What did you propose to do with regard to this Irene person?

A. I didn't propose to do anything.

Q. When you called them up?

A. Nothing.

Q. What were you going to suggest?

A. No, sir, I wasn't going to suggest anything. Irene was really their problem because, as I told them over the telephone, 'Irene is going to get herself involved in what looks like a messy situation and I am afraid you guys might get involved in it. I wanted to tell you about it because I am afraid you might get involved in it because you are expatients of Dr. Freeman', and because my understanding was they

were afraid of gossip. They were afraid of rumors because Mike was going to practice here. They were going to set up their home here" (R. 77-78).

Petitioner gave two completely different versions of what he said to the Trombleys over the telephone. He first testified that he called the Trombleys and told them that he had heard that "Mrs. Weirhake was going to accuse Dr. Freeman of rape or sexual immorality" (R. 71). Later in his testimony, however, he stated that he did not tell the Trombleys that he had "heard that she was going to testify that she had been raped by Dr. Freeman" (R. 92; and also R. 87-88, 89-90). His first version was as follows:

> "But, oh well, anyway I called him on the phone because I had heard this Mrs. Weirhake was going to accuse Dr. Freeman of rape or sexual immorality. At that time I knew Dr. Freeman was going to have a hearing but I didn't know who the witnesses were going to be, or anything, and as a—what I consider to be a friendly gesture—I called up the Trombley home. I did it because I had been told that Irene Weirhake had gone loco and all of a sudden decided to accuse Dr. Freeman of rape or sexual immorality, whatever it was, and I called him up to inform them of this. Mrs. Trombley answered the phone. I said, 'This is Mike Zipkin.' She said, 'Yes.' And within a period of, I don't know, two or three minutes, not that long, seconds, I heard the extension or somebody clinking the telephone. **I said, 'And I just heard Irene Weirhake is going to accuse Dr. Freeman of rape and I wanted to tell you about this because if Irene gets into a mess she is just liable to drag you into it.** She lives with you and your being ex-patients of Dr. Freeman, I thought you ought to know about it. If she gets into a messy situation, you and Mike might be dragged into it.' " (R. 71, Emphasis supplied.)

Petitioner's second version of what he said to the Trombleys was as follows:

"Q. All right and you were calling the Trombleys, as I understand it, to inform them that Irene was going to testify to rape and sexual intercourse although I also understood you to say you were confident in your own mind that Irene wouldn't do anything like that?

A. **No. I called the Trombleys simply to tell them I heard Irene was going to testify. I didn't know what to.**

Q. I thought I understood you to say a little while ago you were confident in your own mind Irene wouldn't do (fol. 131) anything like that?

A. I wasn't confident. I found it difficult to believe.

Q. Well, you knew what it was you were going to say, what you had heard she was going to say?

A. **No, I did not hear what Irene was going to say. All I heard was Irene was going to testify against Freeman at his hearing.**

Q. **You mean when you called the Trombleys you didn't talk to them and say to them and you didn't know what it was she was going to testify, that it was sexual?**

A. **No. I called the Trombleys and all I said to them was, 'I heard Irene was going to testify against Dr. Freeman at his hearing.'** " (R. 87-88, Emphasis supplied.)

. . .

"Q. Didn't you just get through telling Mr. Seiler that you didn't know what she was going to testify to before you (fol. 134) called Trombley? Which is right, did you or didn't you?

A. **Here is what is right. I called up the Trombleys and informed them of exactly what I heard.**

Q. **What did you hear?**

A. **That Irene was going to testify against Freeman at his hearing. I didn't hear what about or what the charges were. I had no idea.**

Q. You didn't tell in answer to a question over here (indicating) you did know?

A. I know now what she testified. I read it in the newspaper.

Q. Why did you call Trombleys?

A. I called the Trombleys to inform them that the woman who was living with them was going to testify against Dr. Freeman. I thought they ought to know about it.

Q. Why would that make any difference to the Trombleys unless it was specifically against them?

A. You would have to know the Trombleys. I could tell you. These are as high a society people as you can get and anything like that woman going into a hearing and saying, yes, I live with Trombleys, and yes, I have been raped by a psychiatrist——

Q. **That is the thing you didn't know? This rape by the psychiatrist business.**

A. **That is right I didn't. I didn't know yet.**" (R. 89-90, Emphasis supplied.)

. . . .

"Q. I would like to ask a couple of questions. I understood you—let me get at it this way. I want you to be sure that you understand what your testimony is here as to what you told the Trombleys. I want you to reflect on what you had heard and what you actually told them as to your understanding to what Irene was going to testify to. **Now, reflect on that very carefully and tell us your best recollection of how much detail, if any, you went into with the Trombleys in your description of what you had heard Irene was going to testify to?**

A. **I only told the Trombleys one thing. I only made**

one statement. I said, 'I heard that Irene Weirhake—I heard a rumor that Irene Weirhake was going to testify at this hearing of Dr. Freeman's.'

Q. So that I understand your testimony, it is that you did not tell that you had also heard that she was going to testify that she had been raped by Dr. Freeman or words to that effect?

A. **No, sir.** (R. 92, Emphasis supplied.)[4]

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[4] Petitioner made several other inconsistent statements. Thus, he first testified that he talked to Dr. Freeman about the fact that Mrs. Weirhake was going to testify at Dr. Freeman's hearing *prior* to his call to the Trombleys, but he later testified that he did not talk to Dr. Freeman about this until after he called the Trombleys. Thus, he first testified:

"Q. Well, no. As I understand what you told me a moment ago Dr. Freeman didn't know about the testimony that Irene was supposed to give. That was the information you had. Is that right?

A. Oh, no. I think Dr. Freeman knew and I think several people must have known and I think I heard it and then I heard it from him. Then I heard it from another person that Irene was going to testify.

Q. Was this before you made the call?

A. Yes, before I made it. I had difficulty believing it because of what I knew about Mrs. Weirhake" (R. 81, Emphasis supplied).

Later, petitioner stated that he did not talk to Dr. Freeman before he called the Trombleys. His testimony was as follows:

"Q. I understood you to tell Mr. Croft a moment ago that Dr. Freeman did not tell you about Irene Weirhake's proposed testimony. Am I mistaken on that?

A. No, no. I did not discuss Mrs. Weirhake or Mrs. Weirhake's testimony with Dr. Freeman prior to making the phone call to the Trombleys. That is what I meant.

Q. Didn't you just tell Mr. Oliver that Dr. Freeman told you Irene was going to testify.

A. Yes.

Q. Well, you mean that he didn't tell you that until after you informed him you had called the Trombleys?

A. No.

Q. Straighten me out?

A. I'll try to explain it the best I can. To my best recollection I heard this rumor. I think it was at some kind of gathering, social gathering, that Irene Weirhake was going to accuse Dr. Freeman of rape and sexual immorality at this hear-

Thus, petitioner at one time in his testimony stated that he called the Trombleys and told them that he had "just heard Irene Weirhake is going to accuse Dr. Freeman of rape and I wanted to tell you about this because if Irene gets into a mess, she is just liable to drag you into it" (R. 71); and yet he also testified later that when he called the Trombleys "all I said to them was, 'I heard Irene was going to testify against Dr. Freeman at this hearing'" (R. 88). Petitioner has candidly admitted in his brief that he testified inconsistently as to whether or not he heard that Mrs. Weirhake was going to accuse Dr. Freeman of rape or sexual immorality. See Brief of Petitioner at pages 29-30, note 19.

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ing that he was going to have. I called Trombleys and told them what I had heard because I didn't think they knew and then Dr. Freeman told me that Irene was going to testify against him. I said, 'Are you sure? I heard just a rumor.' He said, 'No, I am sure.'

Q. And at that time you didn't tell the doctor about your call to the Trombleys?

A. No, I didn't.

Q. And their reaction?

A. No" (R. 86-87, Emphasis supplied).

Other inconsistencies in petitioner's testimony were noted by the Board. Petitioner testified that the "end of the friendship (with the Trombleys) was some time in 1959 as best I can tell" (R. 85), and yet he also testified that when he made the phone call to the Trombleys in the Spring of 1960, he was "under the impression that Mr. and Mrs. Trombley were still my friends" (R. 71). Petitioner also stated in his testimony that it was his understanding that the Trombleys were instrumental in getting Mrs. Weirhake to testify and that they already knew about her being involved in the hearing when he called them (R. 72, 78), but he stated at another point in his testimony that he called them because he did not think they knew Mrs. Weirhake was going to testify (R. 87). Although there may conceivably be some way in which to explain away these apparent inconsistencies (See Brief of Petitioner at pages 29-30, note 19), the statements made by petitioner are basically inconsistent, and the Board's finding that they were inconsistent (R. 97) is warranted from the record.

Decision of the Board of Law Examiners and of the Supreme Court of Missouri

On February 13, 1961, the Board of Law Examiners filed its opinion and decision in the Supreme Court of Missouri (R. 93-104). Four members of the Board joined in the opinion and decision and one member dissented. The Board stated that its decision was "based on its observation of the witnesses and a study of the transcript" (R. 96). The Board found as a fact that Trombley's version of the telephone conversation was the correct one and that petitioner did attempt to influence the testimony of Mrs. Weirhake by approaching the Trombleys with the suggestions as testified to by Mr. Trombley. It also found that petitioner did not tell the Board the truth concerning what he said in the telephone conversation and concerning whether or not he knew when he made the phone call that Mrs. Weirhake was going to testify as to sexual relations with Dr. Freeman (R. 98). The Board concluded that "the burden of proof of good moral character has not been satisfied by the applicant" and held that he should not be permitted to take the bar exam (R. 101). It held that the previous findings of good moral character were not binding because the bar committees making these determinations did not have before it the facts which were presented at the hearing before the Board of Law Examiners (R. 101).[5]

One member of the Board dissented. In so doing, however, that member stated that "if the problem was confined merely to a determination of whether Trombley or Zipkin was telling the truth as to what was said in that single telephone conversation, I would not feel bound to dissent from the judgment of my colleagues on that single

[5] The Board found in favor of petitioner on the charge that he held himself out as an attorney (R. 98-99).

question . . . " (R. 102). The dissent was based, rather, on the ground that there was not sufficient evidence to sustain the finding of the Board that petitioner did in fact attempt to influence the testimony of Mrs. Weirhake and that therefore there was no sufficient evidence upon which to base a finding of lack of good moral character (R. 102, 103, 104).

Petitioner filed a motion for judicial review and exceptions to the findings of the Board of Law Examiners, and on April 10, 1961, an order was entered by the Supreme Court of Missouri overruling the exceptions and affirming the findings and order of the Board. The Court held that it had considered the transcript, the record, the file, and also the motion for review, and the Court concluded that the "order is supported by competent and substantial evidence on the whole record" (R. 118). A motion for rehearing was denied on May 8, 1961, and this Court granted the petition for a writ of certiorari on October 9, 1961.

ARGUMENT

I

The Decision Below That Petitioner Did Not Satisfy His Burden of Proof Is Correct and Is Supported by Rational Evidence in the Record

The Missouri Board of Law Examiners is a State administrative tribunal created under Rule 8 of the Rules of the Supreme Court of Missouri. Mo. Rev. Stat., Supreme Court Rule 8.01 (1959). The Board is composed of five persons and is charged with the duties, among others, to conduct the Missouri Bar Examination and "to determine the moral character and general fitness of applicants for registration as law students and of applicants for admission to the Bar." Mo. Rev. Stat., Supreme Court Rules 8.01 and 8.02 (1959). No person is eligible to take the Missouri Bar Examination unless he is of good moral character and the "burden of establishing his eligibility shall rest on the applicant." Mo. Rev. Stat., Supreme Court Rules 8.05 and 8.07 (1959). No applicant to take the bar examination may be examined until his application has been considered and approved by the Board of Law Examiners, and prior to granting approval to take the exam, the Board must investigate the moral character of the applicant. In so doing, it may call upon the Bar Committees of the various judicial circuits in the State of Missouri to make an investigation of an applicant and report their findings to the Board. The Board may make "such further investigations as may be necessary fully to inform itself concerning the moral fitness of the applicant" and "in no event will permission be granted . . . to take the bar examination until the investigation as to moral character has been completed." Mo. Rev. Stat., Supreme Court Rule 8.07 (1959).

The burden of proof of good moral character is upon the applicant and is ordinarily established in the first instance by filing with the Clerk of the Supreme Court of Missouri the affidavits of two practicing attorneys admitted in Missouri who are acquainted with the applicant and who can attest that he has such character and general fitness as justifies his admission to the bar. Mo. Rev. Stat., Supreme Court Rule 8.06 (1959). Thus, the rules for admission to the bar in Missouri are not unlike the rules generally applicable in other states, and the general procedure is aptly stated by this Court in its opinion in the second Konigsberg case, **Konigsberg v. State Bar of California**, 366 U. S. 36, 41-42 (1961):

> "Under such a rule an applicant must initially furnish enough evidence of good character to make a prima facie case. The examining Committee then has the opportunity to rebut that showing with evidence of bad character. Such evidence may result from the Committee's own independent investigation, from an applicant's responses to questions on his application form, or from Committee interrogation of the applicant himself. This interrogation may well be of decisive importance for, as all familiar with bar admission proceedings know, exclusion of unworthy candidates frequently depends upon the thoroughness of the Committee's questioning, revealing as it may infirmities in an otherwise satisfactory showing on his part. This is especially so where a bar committee, as is not infrequently the case, has no means of conducting an independent investigation of its own into an applicant's qualifications. If at the conclusion of the proceedings the evidence of good character and that of bad character are found in even balance, the State may refuse admission to the applicant, just as in an ordinary suit a plaintiff may fail in his case because he has not met his burden of proof."

Here, petitioner initially made a prima facie case of good moral character in connection with his law school registration and in connection with his application to take the bar examination. It was after petitioner took the bar examination and failed that the Board of Law Examiners, prior to granting petitioner permission to take a second examination and pursuant to its power under Supreme Court Rule 8.07 to "make such further investigations as may be necessary fully to inform itself concerning the moral fitness of an applicant," held the hearing which is now under review. At the conclusion of the hearing, the Board held that although petitioner had made a prima facie case of good moral character by reason of the prior determinations made by the Bar Committees (R. 101) and by reason of the evidence presented at the hearing itself with regard to petitioner's general reputation (R. 100), this prima facie showing was more than balanced by the specific evidence at the hearing, particularly the testimony of Trombley and also petitioner's own testimony. The Board therefore concluded, as a jury might determine in an ordinary suit, that petitioner had not sustained his burden of proving good moral character and therefore the Board was unwilling to conclude that petitioner had proved good moral character by a preponderance of the evidence.

The Board specifically held that it based its decision not only on a study of the transcript of the hearing but also on "its observation of the witnesses" (R. 96). Basically, the Board's finding that petitioner's burden of proof had not been satisfied was based on three separate findings: (1) "That applicant Michael Zipkin did attempt to influence the testimony of Irene Weirhake by approaching Mr. and Mrs. Trombley with the suggestions as testified to by Trombley" (R. 98); (2) "That applicant Michael Zipkin was not telling the truth in his testimony before the Board with regard to what he said in the tele-

phone conversation to Mr. and Mrs. Trombley" (R. 98); and (3) "That applicant Michael Zipkin was not telling the truth in his testimony before the Board . . . as to whether or not he knew when he telephoned them (the Trombleys) that Mrs. Weirhake was going to testify as to sexual relations with Freeman" (R. 98). It is respectfully submitted that as to each of these findings the "evidence in the record, . . . with the aid of all reasonable inferences flowing therefrom, casts such doubts upon petitioner's prima-facie case as to justify" the Board's finding that petitioner had not made a satisfactory showing of good moral character. **Konigsberg v. State Bar of California**, 366 U. S. 36, 42 (1961).

(1) The attempt to influence the testimony of Mrs. Weirhake

The Board held that it believed the testimony of Mr. Trombley concerning what petitioner said in the phone conversation (R. 100). Trombley testified that petitioner said as follows:

> "He (petitioner) mentioned the fact that he was helping Dr. Freeman with his case and that things were looking well, that there had been some new material, or something new had come up but there was a problem in that Irene, I mean Mrs. Weirhake, was in a truth telling mood and that he felt my wife and I should meet with he (sic) and Dr. Freeman to see what could be done about Mrs. Weirhake" (R. 57, and see R. 61).

Trombley testified that he asked petitioner whether he was trying to intimidate a witness and what "was going on," and petitioner stated: "I think it would be better for everybody all the way around if we met and decided what to do with Mrs. Weirhake" (R. 57).

The background to this phone call is important. Mrs. Weirhake was employed by the Trombleys as a house-

keeper and lived in a basement apartment in the Trombley home (R. 55, 56). She had been a patient of Dr. Freeman and, in fact, petitioner believed that Mrs. Weirhake was not mentally competent (R. 88). Shortly prior to the telephone call, Mrs. Weirhake had told Dr. Freeman that she was going to testify at his hearing and Dr. Freeman had advised her that that would not be the wise thing to do (R. 60). Then, petitioner called Trombley, whom petitioner apparently still considered his friend (R. 85), and told Trombley that "there was a problem" because Mrs. Weirhake "was in a truth telling mood" and that Trombley should meet with petitioner and Dr. Freeman "to see what could be done about Mrs. Weirhake" (R. 57).

From the foregoing facts, it is submitted that the Board was justified in finding that the purpose of petitioner's phone call was to try to influence the testimony of Mrs. Weirhake through Mr. Trombley. The Board could reasonably have found that petitioner believed the best way to influence the testimony of Mrs. Weirhake was not by approaching Mrs. Weirhake herself but by approaching the person for whom she worked and with whom petitioner still considered himself friendly. Petitioner felt that the Trombleys were afraid of "gossip" (R. 77), and he may have believed that because of this, the best way to influence the testimony of Mrs. Weirhake was by talking to them over the phone in the manner testified to by Trombley (R. 57, 61). It is submitted the Board of Law Examiners was justified in finding that the facts support such a finding or, at the very least, that the findings are not "so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment" **Garner et al. v. Louisiana**, 82 Sup. Ct. 248, 251 (1961).

(2) Petitioner did not tell the truth in his testimony before the Board with regard to what he said in the telephone conversation to Mr. and Mrs. Trombley.

The Board also found that petitioner had not satisfied his burden of proving good moral character because he did not tell the Board the truth with regard to what he said in his telephone conversation with the Trombleys (R. 98). It is important to point out that this finding that petitioner did not tell the truth is not based solely on the evidence offered by Trombley concerning what was said during the conversation, but it is also based on the fact that petitioner himself gave two substantially different versions of what he said to the Trombleys. Thus, the finding of the Board that the petitioner did not tell the truth about the conversation is founded upon two independent factors: (a) Trombley's version of the telephone conversation was correct and both of petitioner's versions of the telephone conversation conflicted with Trombley's version; and (b) Petitioner himself gave two completely contradictory versions of the telephone conversation.

Trombley's version of the telephone conversation was that petitioner stated that Mrs. Weirhake was "in a truth telling mood" and Trombley should get together with petitioner and Dr. Freeman "to see what could be done about Mrs. Weirhake" (R. 57, and see R. 61). The Board chose to believe this version of the conversation (R. 100) and it therefore concluded that petitioner did not tell the truth when he stated that the version given by Trombley was incorrect (R. 78).

Moreover, the record demonstrates that petitioner could not possibly have been telling the truth concerning the contents of the phone conversation because he gave two different versions of it, and both could not be truthful. Petitioner's first version was:

> "I said, 'And I just heard Irene Weirhake is going to accuse Dr. Freeman of rape and I wanted to tell

you about this because if Irene gets into a mess she is just liable to drag you into it' " (R. 71).

Petitioner later changed this testimony and stated that he did not mention that Mrs. Weirhake was going to testify to anything of a sexual nature. Thus, he stated:

"Q. You mean when you called the Trombleys you didn't talk to them and say to them and you didn't know what it was she was going to testify, that it was sexual?

A. No. I called the Trombleys and all I said to them was 'I heard Irene was going to testify against Dr. Freeman at his hearing' (R. 87-88).

* * * * * * * *

"Q.. . . Now, reflect on that very carefully and tell us your best recollection of how much detail, if any, you went into with the Trombleys in your description of what you had heard Irene was going to testify to?

A. I only told the Trombleys one thing. I only made one statement. I said, 'I heard that Irene Weirhake—I heard a rumor that Irene Weirhake was going to testify at this hearing of Dr. Freeman's.'

Q. So that I understand your testimony, it is that you did not tell that you had also heard that she was going to testify that she had been raped by Dr. Freeman or words to that effect.

A. No, sir": (R. 92).

This change in testimony by petitioner is significant. He first testified that he told the Trombleys that he had heard that Mrs. Weirhake was "going to accuse Dr. Freeman of rape and I wanted to tell you about this because if Irene gets into a mess she is just liable to drag you into it" (R. 71). After he had so testified, petitioner was closely examined by the Board concerning the reason and purpose for his telephone call. See record at pages 77-78

and 79-83. If petitioner had heard that Mrs. Weirhake was going to testify against his friend, Dr. Freeman, to the effect that he had raped or had immoral relations with her, it might reasonably appear that the purpose of his phone call, in view of Trombley's fear of gossip and his close relationship with Mrs. Weirhake, was to prevent this unfavorable testimony. On the other hand, if petitioner had not heard what Mrs. Weirhake's testimony was going to be, then a phone call to the Trombleys to inform them merely that Mrs. Weirhake was going to testify could not be for the purpose of preventing her testimony since, so far as petitioner knew, Mrs. Weirhake might have testified that she was not raped or did not have sexual relations with Dr. Freeman. Her testimony might therefore have been favorable to Dr. Freeman, and there could be no basis for the Board inferring that the purpose of the call was to prevent her testimony. Petitioner, realizing this as a result of the questions propounded by the Board (R. 77-78, 79-83), changed his testimony to prevent a malevolent purpose for the call from being inferred by the Board and testified that when he called the Trombleys, he did not know about "this rape by the psychiatrist business" (R. 90) and that all he said to the Trombleys was one thing: "I heard that Irene Weirhake—I heard a rumor that Irene Weirhake was going to testify at this hearing of Dr. Freeman" (R. 92).

Thus, it is submitted that the Board was justified in finding that petitioner did not tell the truth about what was said in the telephone conversation, both because petitioner's testimony differed from Trombley's and also because petitioner's testimony was internally inconsistent. Failure to tell the truth by an applicant at a hearing to determine his good moral character is, it is respectfully submitted, sufficient ground in itself upon which to hold that petitioner has not satisfied his burden of proving good moral character.

(3) **Petitioner did not tell the truth in his testimony before the Board as to whether or not he knew when he telephoned the Trombleys that Mrs. Weirhake was going to testify as to sexual relations with Dr. Freeman.**

In addition to the findings previously mentioned, the Board also found that petitioner did not tell the truth in his testimony with regard to whether or not he knew when he telephoned the Trombleys that Mrs. Weirhake was going to testify to sexual relations with Dr. Freeman (R. 98).[8] Since petitioner gave two diametrically opposite versions concerning whether he knew of this prior to the phone call, it is submitted that one of the versions could not be the truth and that therefore this finding by the Board is supported by the evidence. Petitioner in his brief candidly admits a variance in his testimony on this point. See Brief of Petitioner at pages 29-30, note 19.

That petitioner had learned prior to the call to the Trombleys that Mrs. Weirhake's testimony was going to be that she had had sexual relations with Dr. Freeman is shown by petitioner's early testimony at the hearing. Thus, petitioner testified that he told the Trombleys that he had "just heard Irene Weirhake is going to accuse Dr. Freeman of rape" (R. 71). Petitioner also stated that he called Trombleys because he "had heard this Mrs. Weirhake was going to accuse Dr. Freeman of rape or sexual immorality" (R. 71). Yet, later in his testimony, peti-

[8] Naturally, no one "knows" for certain to what a person is going to testify since no one can predict future testimony accurately. A person "knows" of things of this nature only in the sense that he has "learned" of what is supposed to happen. See the second definition of "know" in Webster's New Twentieth Century Dictionary, Unabridged (2d edition, 1960). Clearly it is in this sense that the Board found that petitioner did not tell the Board the truth as to whether or not he knew Mrs. Weirhake was going to testify to rape or immoral relations with Dr. Freeman when he called the Trombleys. The record shows that petitioner did testify inconsistently about what he had heard prior to the call. See text above and Brief of Petitioner, pages 29-30, note 19.

tioner stated that he "did not hear what Irene was going to say" (R. 87), that he didn't know that her testimony was going to be "sexual" (R. 88) and that all he heard was Irene "was going to testify against Freeman at this hearing. I didn't hear what about or what the charges were. I had no idea" (R. 89).

Thus, petitioner first testified that he "heard Irene Weirhake is going to accuse Dr. Freeman of rape" (R. 71) and that he told Trombley of this during the conversation, and yet he later testified that "I did not hear what Irene was going to say" (R. 87) prior to the time of the phone conversation. Petitioner either had heard of the rape charge prior to the time of the telephone call or he did not hear of it. Yet, petitioner testified both that he had heard it (R. 71) and that he had not heard it (R. 87, 88, 89). Since petitioner's testimony was completely contradictory on this point, the Board was justified in finding that he did not tell the Board the truth as to whether or not he had heard when he telephoned the Trombleys that Mrs. Weirhake was going to testify to rape or sexual relations with Dr. Freeman. In fact, as previously pointed out, petitioner admits in his brief that his testimony was inconsistent on this point. See Brief of Petitioner at pages 29-30, note 19. It is therefore respectfully submitted that this finding by the Board is also supported by evidence in the record.

II

The Decision Below Does Not Conflict With the Decisions of This Court in Schware v. Board of Bar Examiners, 353 U. S. 232 (1957), or Konigsberg v. State Bar of California, 353 U. S. 252 (1957), and Is in Accord With the Decisions of This Court

Petitioner urges that the decisions of the Missouri Supreme Court and the Missouri Board of Law Examiners

are contrary to this Court's decisions in **Schware v. Board of Bar Examiners**, 353 U. S. 232 (1957), and **Konigsberg v. State Bar of California**, 353 U. S. 252 (1957). (See brief of petitioner at pages 20-21 and 31.)

An analysis of the facts in those cases shows, however, that the evidence of good moral character submitted by Schware and Konigsberg was overwhelming and the evidence of lack of good moral character was negligible or non-existent; no such showing is presented by the record in this case. Moreover, in those cases there was no question about the truthfulness of the testimony of the applicants before the Boards of Law Examiners, while in the case at hand a serious question of petitioner's truthfulness is presented since the Board specifically held that petitioner did not tell the truth.

In **Schware** the applicant (Rudolph Schware) graduated from law school in 1954 and applied for permission to take the bar examination scheduled for the same month. A hearing was held on the question of his good moral character. At the hearing Schware's law school professors, the members of his law school graduating class, his business associates and the rabbi of the synagogue of which he and his family were members, all gave testimony that he was a good man and a man deeply imbued with a sense of deep responsibility for his family. The evidence showed that he was trustworthy and respectful of the rights and beliefs of others. The record also showed that he was a man of deep religious conviction, read the Bible to an illiterate soldier while in the Army and law to a blind student while at the University of New Mexico law school, and that he supported his wife and two children and paid for a costly professional education by operating a business while studying law. The Court pointed out that "he demonstrated candor by informing the Board of his personal history and by going to the Dean of the law school and disclosing his

past." 353 U. S. 232, 240. The evidence was undisputed that Schware was a man of high ideals and a deep sense of social justice, and not a single witness testified against him.

The only evidence to rebut this overwhelming showing of good moral character was testimony supplied by Schware himself of events which had occurred over 15 years before. From 1934 to 1937 he used certain aliases in order to secure a job in businesses which discriminated against Jews. In 1934 he was arrested while participating in a labor dispute, and he was arrested again in 1940, but the prosecution dropped the charge. Schware also admitted that he had been a member of the Communist Party from 1932 to 1940 when it was a lawful political party with candidates on the ballot in most states and at a time of great depression in this country and when the Communists were fighting a bitter struggle against Fascism. In short, these events occurred long ago and were little, if any, evidence of lack of good moral character. Thus, against an overwhelming showing of good moral character, there was no counterbalancing evidentiary support to justify a finding of lack of good moral character, and this Court therefore held that such a finding deprived Schware of due process of law.

Similarly in the first **Konigsberg** case, 353 U. S. 252, an overwhelming showing of good moral character was made and not rebutted. At Konigsberg's hearing, 42 individuals who had known him at different times for the past 20 years attested to his good moral character, and these testimonials came from a Catholic Priest, a Jewish Rabbi, lawyers, doctors, professors, business men and social workers. Konigsberg was an honor student, taught American History and Literature for a time, served with distinction as an officer in Germany during the Second World War, and many witnesses testified to his belief in democ-

racy, his principled convictions, his honesty and integrity, his conscientiousness and competence in his work and his concern and affection for his wife and children. The only evidence introduced against Konigsberg was that he had attended meetings of a Communist party unit over ten years before (in 1941), that he criticized certain public officials and their policies, and that he refused to answer certain questions about his political associations and beliefs. These factors had little, if any, relevance to his good moral character and did not significantly counterbalance the overwhelming evidence that he was of good moral character.

The case at hand is decidedly different from **Schware** and **Konigsberg**. Only five witnesses, aside from petitioner and Trombley, testified at petitioner's hearing. Of those five, one practicing attorney, Carl Sapp, stated that he was not acquainted with petitioner's reputation, although he felt that in the few times he had seen petitioner he had always conducted himself as a gentleman (R. 4, 5). Another witness, Mr. Baurichter, testified only that petitioner had acted as a gentleman and that he had no reason to believe that petitioner was anything other than a person of good reputation (R. 13, 18). A third witness, Professor Anderson, stated that he was "reasonably" willing to vouch for petitioner's character although he stated that he had some faint reservations about petitioner because of his activities as an election judge (R. 27, 28). The Dean of the law school testified that he was not acquainted with petitioner's reputation, although he had no personal knowledge of any matter which would prohibit petitioner from practicing law. The fifth witness, Mrs. Baurichter, testified that she had known petitioner only for about a year and a half, and she was actually the only person who unequivocally stated that in her opinion petitioner's reputation was good (R. 41, 44). The only other evidence of good moral character was the previous findings

of the Circuit Bar Committees, when petitioner applied for registration as a law student and later for permission to take the bar examination, that petitioner was of good moral character. Not only is there nothing in the record to indicate the basis upon which those decisions were made, but also it is clear that those findings were made prior to the incidents leading up to the hearing by the Board of Law Examiners and prior to petitioner's own testimony at that hearing. Such a showing of good moral character is not comparable to the overwhelming showings of good moral character in the **Konigsberg** and **Schware** cases, in which evidence of good moral character was given by a large number of witnesses from every walk of life.

Moreover, there is a great deal more evidence in this case than in **Schware** and **Konigsberg** which counterbalances and reflects adversely on the showing of good moral character. In both **Schware** and **Konigsberg**, there was no serious question about the truthfulness of the testimony of either of the applicants, and, in fact, in the **Schware** case, this Court pointed out the candor he had demonstrated by disclosing all the events of his past. 353 U. S. 232, 240. In the case at hand, however, the Board of Law Examiners specifically found that petitioner did not tell the truth, a finding which was based not only on the testimony of Trombley, but also on the inconsistent testimony given by petitioner himself on several important aspects of the case. See part I of the argument in this brief, *supra*. Such a lack of truthfulness is supported in the record and is in itself sufficient counterbalancing evidence to warrant a finding that petitioner did not sustain his burden of proving good moral character. Moreover, the evidence against petitioner is not based on facts which occurred ten or fifteen years prior to the hearing, as in the cases of Konigsberg and Schware. Here, the counterbalancing evidence concerned events occurring only a few months prior to the hearing and also events (namely,

petitioner's own testimony) which occurred at the hearing itself. All of these factors are significant and present a basic distinction between the case at hand and the **Konigsberg** and **Schware** cases. It is respectfully submitted that in this case the evidence of good moral character, counterbalanced by the evidence of lack of good moral character, discloses a substantial basis, and at very least a rational basis, for the conclusion of the Board that petitioner did not satisfy his burden of proving good moral character.

Petitioner's reliance on the state court decisions of **Application of Courtney**, 83 Arizona 231, 319 P. 2d 991 (1957), and **In re Schlesinger**, 404 Pa. 584, 172 A. 2d 835 (1961), is misplaced and indicates a possible misunderstanding of the posture of the present case. (See petitioner's brief at page 25, note 15, and 28, note 18.) In the **Application of Courtney**, *supra*, the Arizona Bar Committee refused to certify applicant Courtney's good moral character on the ground that he had attempted to solicit employment for an attorney for whom Courtney was working. The Supreme Court of Arizona reversed this decision after reviewing, *de novo*, the entire record and holding that he had satisfied his burden of proof. In so doing, however, the Supreme Court of Arizona specifically found that the Bar Committee's finding was not "unreasonable or arbitrary." 319 P. 2d 991, 994. The Court held, however, that it had the duty and power to make an independent determination of applicant's good moral character based upon the entire record. Thus the question before the Supreme Court of Arizona was not whether the Bar Committee's action was unreasonable or arbitrary, but, rather, whether, based upon the entire record, the applicant had satisfied his burden of proof. The issue in the case at hand is not whether a *de novo* review of the record shows that petitioner has satisfied his burden of proof; the issue is whether the evidence in the record, together with the aid of all reasonable inferences flowing therefrom, furnishes any rational sup-

port for the conclusion of the board that Petitioner has not satisfied his burden of proving good moral character.

In **Re Schlesinger**, 404 Pa. 584, 172 A. 2d 835 (1961), a practicing lawyer was disbarred on findings of unprofessional conduct made by a Bar Subcommittee. The Supreme Court of Pennsylvania reversed this decision on the grounds that the attorney was denied procedural due process of law, and also on the ground that the findings made by the Subcommittee were not supported by evidence and denied the attorney substantive due process. In so doing, however, the Supreme Court of Pennsylvania pointed out that the burden of proof was on the Subcommittee and that the attorney's license could be taken away only "upon competent and relevant proofs sufficiently credible to support a just order of disbarment." 172 A. 2d 835, 840. In the case at hand the burden of proof is not on the Missouri Bar Committee, but is on the petitioner to prove by a preponderance of the evidence that he is of good moral character.

Petitioner also contends that the decisions of this Court in the second **Konigsberg case**, 366 U. S. 36 (1961), and in **Re Anastaplo**, 366 U. S. 82 (1961), are not in point because they are "obstruction" decisions. (See brief of petitioner at page 21, note 13.) While it is true that those decisions stand for the proposition that it is constitutional for a state not to admit an applicant to the practice of law if he refuses to answer material questions, because such a refusal obstructs the proper functioning of a bar committee, that holding has direct relevance in the case at hand. Here, there is presented not simply a case of a bar applicant refusing to answer material questions; petitioner answered questions, but he did not answer them truthfully. Failure to give truthful answers to questions is more of an obstruction of a Bar Committee's proper functioning than is a simple refusal to answer questions at all. It

should therefore also be constitutional for a state not to admit an applicant if he gives untruthful answers.

Finally, the decision of the **Anastaplo case** is pertinent to the case at hand because it emphasizes the fact that the function of this court "is solely one of constitutional adjudication, not to pass judgment on what has been done as if we were another state court of review, still less to express any view upon the wisdom of the State's action." 366 U. S. 82, 97. The only constitutional question is whether the decision below that petitioner has not satisfied his burden of proof finds rational foundation in the record. It is submitted that the evidence of good moral character, which can be described only as meager, together with counterbalancing evidence, which consists of the testimony of Trombley and the internally inconsistent testimony of petitioner, furnishes a rational basis for the decision of the Board that petitioner did not prove his good moral character by a preponderance of the evidence.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

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